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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANN NAVEY CLARK, Executrix
of the Estate of
ANDREW J. CLARK, JR., Deceased,

Petitioner,

v.

E. I. DU PONT DE NEMOURS and COMPANY, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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36 pp

QUESTIONS PRESENTED FOR REVIEW

I. Are Leased Employees who are Considered Common Law Employees Entitled to Employer Provided Pension and Welfare Benefits Under ERISA?

II. Does ERISA Require that Common Law Employees be Entitled to Receive Benefit Plan Documents upon Written Request?

TABLE OF CONTENTS

Page

Questions Presented for Review . . . . . (i)

Table of Authorities . . . . . (iii)
(iv)

Opinions Below 2

Jurisdiction 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 5

Conclusion 11

TABLE OF AUTHORITIES

CASES: **Page**

Nationwide Insurance Co. v. Darden,
503 U.S. 318, 323-24,
112 S.Ct. 1344,
1348 117 L.Ed.2d 581 ..... 5, 6, 7, 8, 9, 10

Vizcaino v. Microsoft Corp,
97 F.3d 1187 (9th Cir. 1996) 7

Abraham v. Exxon, 85 F.3d 1126 (5th Cir. 1996) .. 7, 10

Crouch v. Mo-Kan Iron Workers Welfare Fund,
740 F.2d 805 (10th Cir. 1984) 8

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85, 91, 77 L.Ed.2d 498,
103 S.Ct. 2890 (1983) 8

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101, 117-18 (1989) 10

Davis v. Featherstone,
97 F.3d 734, 736-38 (4th Cir. 1996) 10

Renda v. Adam Meldrum & Anderson Co.,
806 F.Supp. 1071 (W.D. NY., 1992) 10

Brooke v. Mountain States Tel. & Tel,
943 F.Supp. 1317 (D. Colo 1996) 10

UNITED STATES STATUTES: **Page**

29 USC Section 1132(e) 2

29 USC Section 1002(B)(6) and (7) 2

29 USC Section 1132(a)(1)(B) 3

29 USC Section 1021(a) 3

29 USC Section 1024(b) 3, 9

29 USC Section 1022(a)(1) 3

29 USC Section 1132(c)(1) 3, 9

Internal Revenue Code 26 USC Section 414 . . . . 4, 5, 6

26 USC Section 414(n)(2) 4

29 U.S.C. Section 1002(b) 6, 9

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Anne Navey, Clark, Executrix of the Estate of Andrew J. Clark, Jr., Deceased, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on January 9, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is not reported and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decision of the United States District Court for the Western District of Virginia has not been reported. It is reprinted in the appendix hereto, p. 14a, infra.

JURISDICTION

Invoking federal jurisdiction under 29 USC Section 1132(e), the Petitioner brought this suit in the United States District Court for the Western District of Virginia, Danville Division. On September 26, 1995, the Western District granted summary judgment and dismissed the Petitioner's complaint.

On Petitioner's appeal, the United States Court of Appeals for the Fourth Circuit on January 9, 1997, affirmed the decision of the Western District of Virginia and dismissed the Petitioner's complaint.

The jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 USC Section 1002(B)(6) and (7) which state that the term "employee" means any individual employed by an employer. The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization or whose beneficiaries may be eligible to receive any such benefit.

29 USC Section 1132(a)(1)(B) which states that a civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 USC Section 1021(a) which states the administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description described in section 1022(a)(1) of this title.

29 USC Section 1132(c)(1) which states that any administrator who fails to meet the requirements of paragraphs (1) or (4) of section 116 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting

participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Internal Revenue Code 26 USC Section 414 defines a "leased employee" as one who (A) performs services pursuant to an agreement between the recipient and a third party; (B) has performed such services for the recipient on a substantially full-time basis for a period of at least 1 year; and (C) whose services are of a type historically performed, in the business field of the recipient, by employees. 26 USC Section 414(n)(2).

STATEMENT OF THE CASE

Andrew J. Clark ("Clark") worked exclusively for du Pont from September 1962 to December 1970 in the Engineering Department of the du Pont plant located in Martinsville, Virginia until he was laid off. Mr. Clark was later reemployed by du Pont in 1976 at the same Martinsville, Virginia Plant and remained so employed until 1993 when du Pont decided it no longer was in need of his services. Clark was paid through a series of agreements between du Pont and various leasing companies who paid Clark. Du Pont provided numerous pension and welfare benefits for employees at no cost to its employees. Du Pont's Contributory Group Life Insurance Plan, Contributory Group Life Insurance Plan, Career Transition Financial Assistance Plan, Medical and Dental Assistance Policy, and Vacation Plan (the "welfare plans") defines eligibility as "Full Service Employees" as such term is defined in the Company's Continuity of Service Rules." Du Pont's Continuity of Service Rules define "Full Service Employee" as "any person designated by the

Company as full-time employee. Any Full Service Employee on the roll 12/1/85 who continues to work at least 20 hours per week on a regular basis will be considered a Full Service Employee."

Du Pont's Tax Reform Act Stock Ownership Plan, Savings and Investment Plan and Pension and Retirement Plan (the "retirement plans") expressly exclude from participation individuals who "must be treated as employees of the Company for limited purposes under the 'leased employee provisions' of Section 414(n) of the [Internal Revenue] Code." The leasing companies did not provide similar benefits for those employees leased to du Pont and under du Pont's supervision.

Du Pont refused to place Clark on its "rolls" in spite of his repeated requests because it knew that it would obligate it to pay him significant benefits due to his long service as an employee leased to du Pont. The United States District Court for the Western District of Virginia held that Clark was a common law employee of du Pont under the common law test set forth in Nationwide Insurance Co. v. Darden, 503 U.S. 318, 323-24, 112 S.Ct. 1344, 1348 117 L.Ed.2d 581. However, the District Court held that even though Clark was an employee of du Pont, du Pont was not required to include Clark in its pension and welfare benefits plan and was justified in denying him access to plan documents.

The Fourth Circuit Court of Appeals affirmed the decision of the United States District Court that Clark need not be granted welfare benefits payable to other du Pont employees and du Pont was not required to provide Clark with plan documents upon written request.

REASONS FOR GRANTING THE WRIT

I.

In 1992, this Court decided the case of Nationwide Ins. Co. v. Darden, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 1348 117 L.Ed.2d 581. Darden, supra, concerned whether employees should be classified as either independent contractors or "common law" employees based upon the factors of employer control. This Court adopted a "a common law test for determining who qualifies as an 'employee' under ERISA." See Darden, supra. Clark met the test for being considered a "common law" du Pont employee.

ERISA has defined an "employee" as "any individual employed by an employer." 29 U.S.C. Section 1002(b). However, this Court did not explain the implications of the Darden decision upon the employment relationship that was established due to the classification of an employee as a "common law" employee for the purpose of the receipt of employer-provided pension and welfare benefits. In the context of the employment relationship, many employers have sought to avoid the costs of paying pension and welfare benefits to certain employees by utilizing leasing companies to pay these employees, thereby avoiding the costly payment of benefits to those employees. While the Internal Revenue Service in adopting IRS Code 414(n) has recognized that employers must include leased employees who work for their employees in excess of one year in their calculations of qualification for their employee benefit plans, the federal courts have been reluctant to interpret these provisions to require these employers to provide employee benefits to those "common law" employees who must be claimed in order to maintain qualified employee benefit plans for their

employees. However, this Court did not see fit in Darden to explain whether or not common law employees should be entitled to the same benefits enjoyed by employees designated by the employer to be eligible for employee benefits. While more and more frequently, employers are seeking to avoid the payment of employee benefits through the use of leasing companies to pay long-term employees such as Clark. This issue concerning the entitlement of common law employees to company benefits has a significant impact on this nation's workforce.

If this Court were to grant Clark's Petition for Writ of Certiorari in this case, it would resolve the differences in the decision of the Fourth Circuit Court of Appeals in Clark, the decision of the Ninth Circuit Court of Appeals Vizcaino v. Microsoft Corp, 97 F.3d 1187 (9th Cir. 1996), and the decision of the Fifth Circuit Court of Appeals in Abraham v. Exxon, 85 F.3d 1126 (5th Cir. 1996). All three cases involved a similar review of the right to determine whether or not the "common law" employees were entitled to benefits under the terms of the various employee benefit plans provided by each corporation and have reached different results.

The irony of the situation faced by long-term "common law" employees such as Clark is that these long-term employees who worked consistently with fellow du Pont employees, but were paid through a leasing company are subject to the same control and supervision as regular employees, yet do not receive employee benefits similar to those du Pont employees on the du Pont "roll." However, under various sections of the Internal Revenue Code, du Pont is required to report such individuals as a part of their qualified benefit plan in order to receive favorable tax treatment for each plan from the Internal Revenue Service.

However, du Pont, as well as other large-scale employers of leased employees believe they can disregard any duty or obligation to treat such employees in an equal manner to those employees it pays through its own corporate accounts. Although du Pont specifically excluded leased employees from its pension plan, the Tenth Circuit Court of Appeals in Crouch v. Mo-Kan Iron Workers Welfare Fund, 740 F.2d 805 (10th Cir. 1984) held that the minimum vesting standards of ERISA require that pension plans include certain categories of employees even though the language of the plans may exclude those employees.

This Court in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91, 77 L.Ed.2d 498, 103 S.Ct. 2890 (1983) held that an employer is free to discriminate against and exclude particular classes as long as certain statutory minimum participation requirements are met. However, in this case, du Pont did not specifically exclude leased employees from participation in its welfare benefit plans. It specifically excluded leased or contract employees from participation in its pension and stock option plans. No such specific exclusion existed in the welfare benefit plan definition that stated the plan was available to employees on the du Pont "roll."

Du Pont never established that it met the statutory minimum required by Shaw, supra, in order to be free to discriminate. The federal courts have utilized the language in Shaw to grant plans the power to exclude those employees who are classified under the Darden test as a "common law" employee from inclusion in various employee benefit plans. While employers may be permitted to provide their benefit plans to certain classes or utilize this case to place some parameters on the ability of employers to exclude employees who are classified as common law employees, but fit the

definition of "employee" under ERISA, 29 U.S.C. Section 1002(b).

Consequently, it appears that there may be some concern that a decision treating certain leased employees equal to those employees on the du Pont payroll will open the flood gates to the providing of benefits to many leased employees. However, such payments are clearly appropriate in those cases where employers employ under a lease agreement while their employment is long term, well over one-year (in Clark's case 17 years) and is not a temporary task involving a single project. This Court should not permit companies such as du Pont to avoid the payment of employee benefits through the use of leasing companies to handle the payroll of their employees where the duties and control by the company all point to employee status and control.

II.

The other issue that bears scrutiny by this Court is the denial to access plan documents by plan participants under ERISA. The Fourth Circuit noted in the Clark decision that:

> ERISA requires that, upon written request of any participant, a plan's administrator shall furnish a copy of the latest updated summary plan description or other instruments under which the plan is established or operated. 29 USC Section 1024(b)(4). A plan administrator who does not comply with a just recovery may, in the court's discretion, be liable for up to $100 per day from the date of such noncompliance. 29 USC Section 1132(c)(1)(B). The Supreme Court has interpreted the disclosure provisions as

> covering, among other, all former employees with colorable claims that they will fulfill eligibility requirements in the future. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18 (1989); see also Davis v. Featherstone, 97 F.3d 734, 736-38 (4th Cir. 1996) (colorable claim is arguable and not frivolous, whether or not it would succeed on the merits).

Even though this is a correct statement of the applicable law that should entitle Clark to access to the du Pont plan documents, the Fourth Circuit upheld du Pont's refusal to grant him plan documents simply because Clark stated he knew he was not a du Pont employee since 1970. However, it was Clark's contention that under the common law tests of Darden and the applicability of Renda v. Adam Meldrum & Anderson Co., 806 F.Supp. 1071 (W.D. NY., 1992) to the question of whether or not Clark had a "colorable claim" for benefits, Clark had presented at least an arguable claim for access to plan documents.

While the Fourth Circuit held that Clark did not have a colorable claim for benefits that would entitle him to access to plan documents, the Fifth Circuit in Abraham v. Exxon Corp., supra held that the authority of Renda, supra would demonstrate that the plan participate had a "colorable claim" for benefits. See also Brooke v. Mountain States Tel. & Tel, 943 F.Supp. 1317 (D. Colo 1996).

If "colorable claim" is synonymous with "arguable" then the Fourth Circuit erred in holding that Clark was not entitled to access to plan documents because he knew he was not on the du Pont roll. Although this holding was recognized by the Fifth Circuit Court of Appeals in Abraham

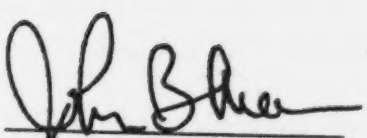
supra, it was ignored by the Fourth Circuit Court of Appeals in Clark. This Court should decide whether or not an employee status as a "common law" employee would entitle him to access to pension and welfare benefit plan documents.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

ANN NAVEY CLARK, Executrix
of the Estate of
ANDREW J. CLARK, JR., Deceased,



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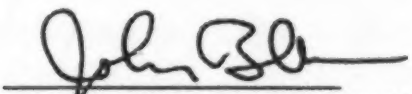
CERTIFICATE OF SERVICE

I, John B. Mann, a member of the Bar of this Court, hereby certify that on this 1st day of April, 1997, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first-class, postage prepaid, to James P. McElligott, Jr., McGuire, Woods, Battle & Boothe, LLP, One James Center, 901 E. Cary Street, Richmond, Virginia 23219, counsel for the respondent herein. I further certify that all parties required to be served have been served.



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AFFIDAVIT OF MAILING
PETITION FOR CERTIORARI

John B. Mann, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On April 7, 1997, at approximately 12:00 P.M., I deposited in the mailbox at 1301 North Hamilton Street, Richmond, Virginia 23230, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 40 copies of the petition for certiorari in the above-entitled case.

John B. Mann

John B. Mann
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STATE OF VIRGINIA
CITY OF RICHMOND, to wit:

The foregoing instrument was acknowledged before me this 7 day of April, 1997, John B. Mann.

My commission expires: October 31, 2000

Wendy C. Westfall
Notary Public

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANNE NAVEY CLARK, Executrix of the Estate of Andrew J. Clark, Jr., deceased,

Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS AND COMPANY, INCORPORATED, as Plan Administrator; E. I. DUPONT NON-CONTRIBUTORY GROUP LIFE INSURANCE PLAN – PLAN #501; E. I. DUPONT CONTRIBUTORY LIFE INSURANCE PLAN – PLAN #501; E. I. DUPONT DE NEMOURS & COMPANY, INCORPORATED PENSION & RETIREMENT PLAN (PLAN NO. 001); E. I. DUPONT SEVERANCE PLAN – PLAN #506; E. I. DUPONT MEDICAL AND DENTAL BENEFIT PLAN – PLAN #503 AND PLAN #507; E. I. DUPONT SAVINGS AND INVESTMENT PLAN – PLAN #002; E. I. DUPONT VACATION PAY PLAN; E. I. DUPONT HOLIDAY PAY PLAN,

Defendants-Appellees.

No. 95-2845

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-94-51-D)

Argued: December 6, 1996

Decided: January 9, 1997

Before WILKINS, HAMILTON, and WILLIAMS, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

COUNSEL

ARGUED: John Bertram Mann, LEVIT & MANN, Richmond, Virginia, for Appellant. James Patrick McElligott, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellees. **ON BRIEF:** Cynthia E. Hudson, Deanna L. Ruddock, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This action involves two separate claims by Andrew Clark, Jr. (Clark) against E.I. DuPont de Nemours & Company (DuPont). Clark's first claim was for benefits pursuant to various DuPont health, welfare, pension, and retirement plans (Plan or Plans) established pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1996). The second claim was for nondisclosure statutory damages due to DuPont's refusal to provide Clark with requested Plan documents. *See* 29 U.S.C. § 1024(b)(4). DuPont moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The district court granted the motion, and Clark timely appealed. Sadly, Clark died after filing his notice of appeal. His executrix, Anne Navey Clark, was substituted in his stead on February 9,

1996. For the reasons stated herein, we dismiss Clark's claim for benefits under the Plans for lack of subject matter jurisdiction and affirm the district court's grant of summary judgment in favor of DuPont on Clark's claim for non-disclosure statutory damages.

I.

Clark was employed directly by DuPont from 1962 until 1970 as a structural steel detailer in the construction division of DuPont's plant in Martinsville, Virginia. DuPont terminated Clark in 1970 following the elimination of its construction division. Since that time, DuPont has supplemented a minimal construction staff with leased employees.

Following his termination in 1970, Carlton Construction Company employed Clark from 1973 to 1975. Carlton Construction Company performed occasional contract work at DuPont's Martinsville plant. After leaving Carlton, Clark worked a few months for Engineers in Industry, which also performed contract work for DuPont. In the summer of 1975, Clark was hired by Belcan Engineering Group, Inc. (Belcan), a national employee leasing firm which had an extensive employee leasing arrangement with DuPont at DuPont's Martinsville plant.

It is undisputed that Clark was a Belcan employee, and he understood that he was not on DuPont's payroll. In fact, after 1970, Clark made inquiries to DuPont about returning to its employ. DuPont informed him that it would not rehire him. Clark, as a Belcan employee, submitted time sheets to Belcan. Those sheets merely listed DuPont as the client for which services were performed. Moreover, the leasing agreement between Belcan and DuPont stated that the leased workers were to be considered ". . . employees of [Belcan], and that none . . . shall be regarded as employees of [DuPont] in any instance." (J.A. 674). Clark participated in Belcan's own health benefits program, and DuPont never made a contribution to any benefit plan for Clark. In 1993, DuPont terminated its contract with Belcan at its Martinsville plant. For his part, Clark did not wish to leave the Martinsville area, so he ceased his employment with Belcan. Clark then applied for unemployment benefits, listing Belcan as his former employer. Subsequently, Clark applied for coverage under the Plans,

asserting that he remained a DuPont employee after 1970 while he was nominally working for various contracting organizations, most especially, Belcan.[1] DuPont, through the administrator of its Plans (Plan Administrator), denied Clark benefits on the ground that he had not been a DuPont employee since 1970 and he was not eligible for benefits under the plain language of the Plans themselves.

Clark later requested copies of the Plan documents. DuPont refused to provide the requested documents, and Clark commenced this action in the United States District Court for the Western District of Virginia. The district court granted DuPont's motion for summary judgment on September 26, 1995, and Clark timely appealed.

II.

Summary judgment is appropriate when there is no genuine issue of material fact to be decided by the trier of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 115 S. Ct. 67 (1994); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Any disputed fact or disagreement in the evidence must be construed in the light most favorable to the non-movant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). We review a district court's grant of summary judgment *de novo*. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

III.

An action for benefits under a plan established pursuant to ERISA may only be brought by a "participant" in or a "beneficiary" of an ERISA plan. 29 U.S.C. § 1132(a)(1). ERISA defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). Therefore, an individual is a "participant" in an ERISA plan if: (1) he is a common law employee of the employer maintaining the plan, *Nationwide Mut. Ins. Co. v.*

[1]Clark did not claim in his complaint that he was entitled to benefits due to his employment with DuPont from 1962 to 1970.

Darden, 503 U.S. 318, 323-24 (1992); *see Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40, 751-52 (1989), *and* (2) he is, according to the language of the plan itself, eligible to receive a benefit under the plan. An individual who fails on either prong lacks standing to bring a claim for benefits under a plan established pursuant to ERISA, and we, as a reviewing court, must dismiss the appeal for lack of subject matter jurisdiction. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986).

When a plan administrator grants or denies benefits under a plan established pursuant to ERISA, we conduct a three-part inquiry. First, we review "*de novo* whether the plan's language prescribes the benefit or whether it confers discretion on the [plan] administrator to determine the benefit." *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 89 (4th Cir. 1996). Second, if the plan does indeed confer discretion, we review *de novo* whether the plan administrator acted within the scope of that discretion. *Id.* Finally, if the plan administrator acted within the scope of his "contractually conferred discretion," we "review the merits" of the plan administrator's decision for an abuse of discretion. *Id.*

For purposes of deciding DuPont's motion for summary judgment, the district court assumed that Clark was a common law employee of DuPont. Thus, it only analyzed whether Clark was, according to the language of the Plans, eligible to receive a benefit under the Plans. The district court then determined that the Plan Administrator did not abuse his discretion when he determined that Clark was not eligible to receive a benefit under the Plans. We agree.

We have reviewed the language of the Plans *de novo* and find that the Plans unmistakably confer discretionary authority upon the Plan Administrator to make benefits determinations. We also find that when the Plan Administrator denied Clark benefits he acted within the scope of that authority. Clark essentially concedes both points. Accordingly, we review the Plan Administrator's decision to deny Clark benefits for abuse of discretion. *Id.*

The Plans may be divided into two groups. The first group consists of a contributory group life insurance plan, a noncontributory group life insurance plan, a career transition financial assistance plan, a

medical and dental assistance plan, and a vacation and holiday benefits policy plan. Persons entitled to participate in those plans are defined in each plan as ". . . any person designated by the Company as a full time employee. Any full service employee on the roll [as of] 12/1/85 who continues to work at least 20 hours per week on a regular basis will be considered a Full Service Employee." (J.A. 717).

The second group consists of a tax reform stock ownership plan and a savings and investment plan. For the limited purpose of obtaining favorable tax treatment under the Internal Revenue Code (I.R.C.), DuPont counts all employees, both payroll and leased, as part of the covered employees for those plans. *See* 26 U.S.C. § 414 (1996); *see also West v. Clarke Murphy, Jr. Self Employed Pension Plan*, 99 F.3d 166, 169 (4th Cir. 1996).[2] However, those plans expressly exclude individuals who must be treated as employees of the Company for limited purposes under the 'leased employee' provisions of Section 414(n) of the [I.R.C.]" from the receipt of benefits. (J.A. 602, 614, 638-39).

The Plan Administrator has always limited eligibility for participation in any of the Plans by defining "on the roll" to exclude contract and leased employees. Clark himself admitted that "if you're not on the DuPont roll, you don't get those benefits." (J.A. 447). Clark was not on the DuPont payroll when he commenced his lawsuit. Indeed, he had not been on DuPont's payroll since his termination in 1970. Thus, with respect to the first group of plans, Clark was not eligible to reap any benefits because he was not a full time DuPont employee and had not been on DuPont's payroll since 1970. With regard to the second group of plans, Clark was not eligible to become a participant while working for a contracting firm because he was a leased employee and all leased employees were specifically excluded from participation in that group of plans. In sum, the Plan Administrator

[2]Several sections of the I.R.C., including § 414, deal with minimum participation requirements, vesting, and funding standards that must be satisfied in order for an employee pension benefit plan to receive favorable tax treatment by the IRS. Thus, solely for tax purposes, § 414 expands the scope of the term "employee" to include affiliated service groups, such as leased employees.

did not abuse his discretion when he denied Clark benefits under the Plans.

For his part, Clark asserts that, pursuant to ERISA, his participation in at least the second group of plans was mandated. Specifically, he maintains that it was a *per se* abuse of the Plan Administrator's discretion to exclude contract workers from participation in the second group of plans when those same workers were accorded employee status in order to secure beneficial tax treatment for DuPont. Viewed in this context, Clark's claim is not so much that he *is* eligible to receive a benefit under the language of the second group of plans, but that he *should be* eligible according to ERISA. However, ERISA actually mandates the opposite conclusion.

ERISA allows an employer to limit plan coverage to certain employees, as long as said "discrimination" is not based on age or length of service. *See* 29 U.S.C. § 1052(a); *see also Abraham v. Exxon Corp.*, 85 F.3d 1126, 1130 (5th Cir. 1996) (§ 1052(a) does nothing more than forbid employers from denying participation in an ERISA plan to an employee on the basis of age or length of service). ERISA simply does not require an employer to provide benefits to every individual in that company's employment. *See Stanton*, 792 F.2d at 434-35 (mere fact of employment does not entitle employee to participation in a plan established pursuant to ERISA). Nor does the I.R.C. definition of "employee" add any gloss to the ERISA definition of an "employee" or a "participant" in a benefit plan established pursuant to ERISA. *West*, 99 F.3d at 169 ("Employee status under ERISA is determined not by the tax code but by the common law of agency."). In short, this court is not in a position to rewrite the Plans at issue here to include additional employees. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 56-57 (4th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993) (participant and beneficiary status defined only by the terms of the ERISA plan at issue). Accordingly, Clark's case must be dismissed. *See Stanton*, 792 F.2d at 434-35.

IV.

We are left with Clark's claim for non-disclosure statutory damages.

Although Clark does not have standing to bring a claim against DuPont for benefits under the Plans, he may have a viable claim for non-disclosure statutory damages if he was erroneously denied Plan documents. ERISA requires that, upon written request of any participant, a plan's administrator shall furnish a copy of the latest updated summary plan description or other instruments under which the plan is established or operated. 29 U.S.C. § 1024(b)(4). A plan administrator who does not comply with a just request may, in the court's discretion, be liable for up to $100 per day from the date of such noncompliance. 29 U.S.C. § 1132(c)(1)(B). The Supreme Court has interpreted the disclosure provisions as covering, among others, all former employees with colorable claims that they will fulfill eligibility requirements in the future. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989); *see also Davis v. Featherstone*, 97 F.3d 734, 736-38 (4th Cir. 1996) (colorable claim is arguable and not frivolous, whether or not it would succeed on the merits). We review the district court's refusal to award non-disclosure statutory damages for an abuse of discretion. *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992).

We believe the district court did not abuse its discretion when it denied Clark non-disclosure statutory damages because Clark did not have a colorable claim for benefits under the Plans. Clark had knowledge that he had not been a DuPont employee since 1970. Furthermore, under no circumstances could Clark be considered a "participant" under the Plans.

V.

In summary, Clark was not a "participant" because he was not eligible to receive benefits under the plain language of the Plans. Accordingly, both he and his executrix lack standing to bring this action and we must dismiss that portion of his appeal for lack of subject matter jurisdiction. Further, the district court did not abuse its discretion when it denied Clark's non-disclosure statutory damages claim, and we affirm that denial.

AFFIRMED IN PART AND DISMISSED IN PART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

ANDREW J. CLARK, JR.	)	
	)	
Plaintiff,	)	Civil Action No.
	)	94-0051-D
v.	)	
	)	MEMORANDUM OPINION
E.I. du Pont de NEMOURS	)	By: Jackson L. Kiser,
and COMPANY, et alia.	)	Chief Judge
	)	
Defendants.	)	

Before me is the defendants' motion for summary judgment. The parties have brief the issues of this motion and I have entertained oral argument. This motion is, therefore, ripe for disposition. For the reasons sated herein, I shall grant the defendants' motion, on the ground that defendant has legitimately excluded plaintiff from the receipt of any benefits conferred upon defendants' employees.

FACTUAL BACKGROUND:

Clark was initially employed in 1962 as a structural steel detailer in the construction division of the Martinsville du Pont plant. He was later promoted to general superintendent and served until he was terminated following the elimination of the construction division in 1970. Since 1970 du Pont has supplemented a skeletal construction staff with leased employees.

After his termination Clark was employed from 1973-75 by Carlton Construction Co., which did occasional contract work at the du Pont facility. From spring to July, 1975,

Clark worked for Engineers in Industry, which also performed contract work for du Pont. Clark was then hired as a senior designer by Belcan Engineering Group, Inc., a national employee leasing firm which entered an employee leasing arrangement at the Martinsville plant.

Two years later, Belcan vice president John Kuprionis began managing the company's account with du Pont. Kuprionis made Clark the Belcan liaison at the Martinsville plant, due to Clark's lengthy, amicable, and respected relationship with the du Pont staff. Because the liaison duties were in addition to those under the lease agreement, Clark was paid a salary premium above the contract amount, with Belcan did not charge to du Pont. Over time, Clark received salary increases from Belcan, with input provided by du Pont. At all times, Belcan paid FICA and FUCA on Clark, insured him, and retained exclusive authority to terminate him. Du Pont has the authority to bar Clark from the plant itself.

Clark served as a general supervisor of all Belcan employees at the site and as a conduit between du Pont and the closest Belcan office, which was in Charleston, West Virginia. Belcan employees submitted their time sheets to Clark, who would forward them to Charleston. All such time sheets, including Clark's, identified Belcan as the employer and du Pont as the client, but were verified by a du Pont signature.

Throughout the 1980's Belcan leased 50 employees to the Martinsville plant. They were housed in trailers on the site, which were provided by Belcan. Drafting tables and other equipment were provided by Belcan. All leased employees, including Clark, were identified by a special contractor badge and used a separate parking lot.

The leasing agreement between Belcan and du Pont stated that the leased workers were to be considered ". . . employees of CONTRACTOR and none . . . shall be regarded as employees of du Pont in any instance.

Clark worked on project teams of three persons, one of whom was a du Pont employee. His job description was provided by du Pont and was identical to that of the other two. Belcan provided no job description. Team composition, goals and scheduling were all decided by du Pont. The progress of each project was monitored by du Pont. Training was provided by du Pont and was tailored for du Pont equipment. Clark has no authority to reassign work or to hire additional employees. Clark worked a different work week from du Pont employees, conforming to the work schedules of outside construction contractors entering the plant for the projects on which Clark was working.

Clark met with Tony Walker, his du Pont supervisor, approximately once a week to review projects. Guidance and supervision by du Pont generally consisted of information and directives regarding general project goals and safety guidelines. Walker did complete work evaluations for Randy Smith, Clark's Belcan supervisor. Smith rarely visited the plant.

Clark participated in Belcan's health benefits programs, but declined to participate in the retirement program. Du Pont never made contributions to any benefit plan for Clark. Clark was aware that he was not considered a du Pont employee. He made inquiries about being returned to the du Pont payroll but was refused. At no time after 1970 was Clark on the du Pont payroll or enrolled in du Pont benefit plans.

In 1993, du Pont ceased leasing employees from Belcan. Clark did not wish to leave the Martinsville area, and his employment with Belcan was terminated. He applied for unemployment, listing Belcan as his employer. He soon applied for coverage under du Pont's health, welfare, and retirement plans. He was denied these benefits on the grounds that he was not a participant in the plans. When he requested to review all the plan documents, he was refused. This action ensued.

DISCUSSION:

Summary judgment is appropriate if there is no issue of a material fact and the movant is entitled to judgment as a matter of law. Fed.F.Civ.P. 56(c); Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994), cert. denied, 115 S.Ct. 67 (1994). The evidence is to be considered in the light most favorable to the nonmovant. Id.

The dispositive issue in this motion is whether the employee benefits plans drafted by du Pont validly excluded Clark from being a plan participant. Solely for the purpose of that analysis, I will assume that clark satisfies the multipartite restatement test for common law employment adopted by Community for Creative Nonviolence v. Reid, 490 U.S. 730, 739-40 (1989) and revisited in Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344 (1992).[1] Operating under this assumption I must examine the benefits plans of du Pont and determine how those plans have classified Clark and if that classification entitles him to receive benefits.

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[1]I emphasize that my assumption is made purely *arguendo*, and is neither a finding of law nor of fact.

The Employee Retirement Income Security Act (ERISA), underlying this action, does not require an employer to provide benefits to every individual in its employ; rather ERISA extends its protection only to those employees identified as participants in the benefits plans. Stanton v. Gulf Oil Corp., 792 F.2d 432, 434 (4th Cir. 1983). A plan must be interpreted according to the language of the plan, and other obvious indicia of intent to cover the employee on question. Bradwell v. GAF Corp., 954 F.2d 798, 800 (2d Cir. 1992). It must not be interpreted according to an ill-defined concept of public policy, but rather under the plain meaning and usages of plan terms. Hardester v. Lincoln Nat'l Life Ins. Co., 33 F.2d 330, 334 (4th Cir. 1994) citing Bullwinkel v. New England Mut. Life Ins. Co., 18 F.3d 429, 432 (7th Cir. 1994).

Employee eligibility for the receipt of benefits is exclusively controlled by the language of the benefits plans. Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 56 (4th Cir. 1992) cert. denied, 113 S.Ct. 1051 (1993). The terms of the plan may be interpreted by the plan administrator, as designated by the employer. This interpretation will be invalidated only if it is an abuse of the discretionary power of the trustee, in other words, it must be reasonable. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). The existence of an alternative interpretation will not render the administrator's reasonable interpretation invalid. De Novel v. Vitro Corp., 885 F.2d 1180, 1188 (4th Cir. 1989).

Du Pont's benefit plans may be divided into two groups. The first, consisting of the Contributory Group Life Insurance Plan, Non-Contributory Group Life Insurance Plan, Career Transition Financial Assistance Plan, Medical and Dental Assistance Plan and Vacation and Holiday Benefits Policy make benefits available to Full Service Employees.

These eligible persons are defined in each plan as "any person designated by the company as full-time employee. Any Full Service Employee on the roll 12/1/85 who continues to work at least 20 hours per week on a regular basis will be considered a Full Service Employee." By affidavit Mary Jo Anderson, the plan administrator, stated that in practice du Pont has consistently limited this definition to persons actually on the company payroll. Clark himself admitted that "if you are not on the du Pont roll, you don't get those benefits."[2] Clark is not on the du Pont payroll, nor has he been since his 1970 termination.

The Tax Reform Stock Ownership Plan, Savings and Investment Plan, and Retirement Plan constitute the second group. For the limited purposes of the Internal Revenue Code, du Pont counts all employees, both payroll and leased.[3] However, du Pont expressly excludes individuals "who must be treated as employees of the Company for limited purposes under the 'leased employee provisions' of Section 414(n) of the [Internal Revenue] Code" from the receipt of benefits. Clark is precisely such a leased employee.

This case is factually similar to the situation addressed in Boren v. Southwestern Bell Telephone Co., Inc., 933 F.2d 891 (10th Cir. 1991). If anything, the situation here is less favorably inclined to confer benefits. In Boren, the plaintiff

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[2]Clark Deposition No. 1, at 102.

[3]Title 26 USC Section 414(n) requires employers to count leased employees merely for the purpose of qualifying pension plans under the requirements of the Internal Revenue Code. Plaintiff's tortuous assertion that 26 USC Section 414(n) may be construed to grant plaintiff benefits under the du Pont corporate plans is without merit.

has been entitled to coverage under the terms of the plan, but had subsequently contracted out of coverage. Here, Clark is excluded from du Pont benefits, both under the terms of the plan and under the consistent interpretations of the plan administrator. From 1970 onwards, du Pont conferred no employee benefits on Clark and made no contribution to any plan benefitting Clark. By his own admission, Clark was fully aware of this and was aware that his leased employee status did not entitle him to du Pont benefits. This awareness was underscored by every paycheck, all of which identified Belcan as his employer.

Clark was the recipient of corporate benefits from Belcan. He enjoyed the protection of the medical plans, but elected not to participate in the retirement plan. Clark cannot now seek to partake of the richer du Pont trough, one from which he was removed in 1970 and from which he has been legitimately excluded ever since.

CONCLUSION:

All parties to the work relationship were aware of their respective legal positions. Clark, Belcan and du Pont knew and acted in accordance with the fact that Clark was an employee of Belcan on lease to du Pont. Clark was never considered or treated as a participant under any of the du Pont plans. No provision in ERISA, nor any of the judicial gloss which has been placed on the Act prohibits such as arrangement. Accordingly, defendant's motion for summary judgment will be granted.

An appropriate Order shall issue.

/S/ Jackson L. Kiser
CHIEF UNITED STATES DISTRICT JUDGE

CONTINUITY OF SERVICE RULES

The following Rules have been adopted by E.I. du Pont de Nemours & Company to govern the determination of the length of an employee's continuous service under the Du Pont Company's various Industrial Relations Plans:

I. DEFINITIONS

(d) The term "Full Service Employee" means any person designated by the Company as a full-time employee. Any Full Service Employee on the roll 12/1/85 who continues to work at least 20 hours per week on a regular basis will be considered a Full Service Employee.